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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 212

HURON HOLDING CORPORATION, a corporation, and NATIONAL SURETY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

D. WORTH CLARK, Esq.,
Washington, D. C.,
SAM S. GRIFFIN, Esq.,
W. H. LANGROISE, Esq.,
E. H. CASTERLIN, Esq.,
Boise, Idaho,
Counsel for Respondent.

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I.

Opinions of Courts Below

Opinion of the United States Circuit Court of Appeals for the Ninth Circuit upon the original appeal from verdict and judgment thereon is reported as *Huron Holding Corpotion vs. Lincoln Mine Operating Company,* 101 Fed. (2d) 458, wherein said judgment was affirmed.

Opinion of the United States District Court upon motions for judgment against petitioner National Surety Cor-

poration, and for satisfaction of judgment, is reported as *Lincoln Mines Operating Company vs. Huron Holding Corporation* in 27 Fed. Supp. 720.

Opinion of United States Circuit Court of Appeals for the Ninth Circuit (herein involved) is reported as *Lincoln Mine Operating Company vs. Huron Holding Corporation*, et al., in 111 Fed. (2d) 438. It is also found at pages 74-78 of the record.

II.

Jurisdiction

(1) Date of judgments of the District Court is May 4, 1939 (R. 61-62), and of the Circuit Court of Appeals, Ninth Circuit, is April 30, 1940 (R. 79).

(2) Petitioner invokes jurisdiction under the provisions of Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U.S.C.A., Sec. 347a).

(3) Petitioner does not refer to any cases believed to sustain jurisdiction.

Respondent refers to the following cases as opposed to jurisdiction, since the question is whether a judgment of a United States District Court in a tort action is, pending appeal therefrom (and supersedeas thereof) to the Circuit Court of Appeals, subject to garnishment in a foreign (state) jurisdiction, and the law is well settled that it is not.

Wabash Railroad Co. vs. Tourville, 179 U.S. 322.
Wallace vs. McConnell, 13 Pet. 136.
Menees vs. Mathews, 197 Fed. 633.

Franklin vs. Ward, 9 Fed. Cas. 711.

Thomas vs. Wooldridge, 23 Fed. Cas. 986.

Henry vs. Mining Co., 15 Fed. 649.

Mack vs. Winslow, 59 Fed. 316.

Lowenstein vs. Levy, 212 Fed. 383.

Ackerman vs. Tobin, 22 Fed. (2d) 541.

U. S. Shipping Board vs. Hirsch L. Co., 35 Fed. (2d) 1010.

(4) The petitioner asserts that one of the questions presented is (Petition, p. 6):

(a) "Was the Idaho District Court required to recognize and give effect to the attachment proceedings which concededly in all respects complied with and were fully authorized by the laws and decisions of the State of New York?"

No such question is involved. No such concessions were ever made by respondent. Respondent did not concede that the attempted attachment of the Idaho United States District Court judgment, while superseded and pending on appeal to the Circuit Court of Appeals, was fully or at all authorized by the laws and decisions of the State of New York. On the contrary, respondent contended that (1) under the laws of the United States and decisions of the United States Courts it is well settled that such a judgment, superseded and pending appeal to a United States Court, was not attachable by the New York State Court; (2) that the decision in *Erie Ry. Co. vs. Tompkins,* 304 U.S. 64, did not change the rule or make applicable New York law or decisions; and (3) even if it did, the laws and decisions of New York did not

authorize attachment of such judgment. This is shown not only by the partial, incomplete and outside the record quotation from respondent's brief (Petition, pp. 19-20), but by the statement of the Circuit Court of Appeals opinion (R. 75).

No question of comity is or was, involved or passed upon. The only question was and is whether a judgment of a Federal Court in Idaho superseded and appealed to the United States Ninth Circuit Court of Appeals was, prior to decision and mandate of such appellate court, of such character as to be subject to attachment by a New York State court, whose jurisdiction to proceed against respondent was dependent upon the effective attachment thereof.

Respondent did concede that New York *procedure* for an attachment or garnishment was followed; it emphatically never conceded that such procedure was *effective* to constitute a seizure of the appealed judgment or a garnishment of Huron, judgment defendant and appellant petitioner, or to give jurisdiction to the New York court.

Statement

The statement of petitioner (Petition, pp. 1-2) may be accepted.

The Facts

The facts, as stated by petitioner (Petition, pp. 2-5) are accepted, except as follows:

(a) Petition, p. 3, lines 6-12. The *procedural steps* for attachment were followed. Effectiveness thereof under the

statute and decision cited is denied, is not fact but matter of law, and involved in the question presented.

(b) Petition, p. 3, lines 14-15. The garnishee, Huron Holding Corporation, did not admit a judgment indebtedness. It returned, and the Sheriff appraised, only that it was the *defendant* against which judgment was entered, and was unpaid "subject to the rights of said Huron Holding Corporation on the appeal taken by it from said judgment and *now pending* in said court." (Record, 26-27; 30-31). In other words, it denied liability upon the judgment and gave notice thereof and of its pending appeal.

(c) Petition, p. 3, lines 18-19. The record does not show that Huron was doing business only in New York and there had its sole assets. The same off the record misstatement is made at pages 7 and 22. In fact, the record in the trial court, and upon the appeal of Huron from the judgment thereof, shows Huron was doing business in Idaho, without compliance with Idaho law, and claimed ownership of real and personal property in Idaho, held in the name of a "dummy", Alexander Lewis; that on such appeal Huron asserted error with respect to its doing business and abandoned the same on argument; that the chattels for detention of which respondent brought action for claim and delivery in Idaho "were in the possession of appellant's (Huron) agent at the Lincoln Mine in Gem County, Idaho" (*Huron Holding Corporation vs. Lincoln Mine Operating Company,* 101 Fed. (2) 458).

(d) Petition, p. 3, lines 24-26. Huron's certificate did not "acknowledge that it was indebted to the respondent in

the amount of said District Court judgment." As above pointed out, Huron only *acknowledged* that it was judgment defendant; and the judgment was unpaid; it gave notice of appeal pending and in effect it denied any liability thereby, or at most only admitted a contingent liability (R. 30-31).

It should be added to the facts that the jurisdiction of the New York court was wholly dependent upon an effective seizure by garnishment on July 12, 1938, while Huron's appeal was pending, and the judgment superseded. (R. 20; opinion *Lincoln Mines Operating Company vs. Huron Holding Coporation*, 27 Fed. Supp. 720, 721.

Reasons for Denying Writ

The petition does not show any special or important reason for granting it; no conflict of decisions with other Circuit Court of Appeals appears; nor has there been decided an important question of Federal law which has not been, but should be, settled by this Court. Rule 38 (5).

Petitioners do not contend otherwise, but concede in the second question asserted to be involved (Petition, p. 6) that the settled Federal rule is that a Federal judgment may not be attached in a foreign jurisdiction. The basis for this rule is not, as asserted by petitioner (Petition, p. 8), Federal common law, but an intolerable conflict of jurisdictions between Federal and State courts, especially where the suit was, as here, undetermined in the Federal Court, and under the Constitution and laws of the United States was subject to further powers and orders of the Federal Court.

Opinion, Ninth Circuit Court of Appeals,
R. 74, 77-78.

Wabash R. Co. vs. Tourville, 179 U.S. 322,327.

The only possible ground asserted by petitioner for issuance of the writ is a claimed misinterpretation of the rule and effect of the decision of this Court in *Erie Railway Co. vs. Tompkins,* 304 U.S. 64. Specifically that decision excepts from operation of local laws "matters governed by the Federal Constitution or by Acts of Congress." Obviously, as the Circuit Court of Appeals points out (R. 78), the powers of the Federal Courts, and their exercise in a suit therein pending, are matters governed by the Constitution and laws of the United States, and not to be made futile, or the Federal Courts rendered powerless by state attachment; no question of misinterpretation is involved.

Furthermore, even if this Court should determine that local New York law was applicable, such local law is settled that a judgment on appeal, being payable only upon the uncertain contingency of affirmance, is not subject to attachment.

ARGUMENT

Summary of Argument

I. It is settled United States law, and so conceded by petitioner, that a judgment of a United States Court, superseded and pending appeal, is not subject to attachment in a foreign jurisdiction.

II. A motion for satisfaction of a Federal judgment is not required to be answered to raise the question of

law as to whether such judgment while superseded and appealed is subject to attachment in a foreign jurisdiction.

(a) The question was raised and argued by respondent in, and decided by, the District Court and the Circuit Court of Appeals, and grounds for decision were not volunteered.

III. The decision in Erie Ry. Co. vs. Tompkins, 304 U. S. 64, does not reverse the rule stated in point I supra, nor subject to local State law, Federal procedure, judgment on appeal or courts which are governed by the Constitution and laws of the United States.

(a) The Federal court judgment attempted to be seized by attachment by a New York court was, at the time, superseded and on appeal, and so long as Federal courts' jurisdiction thereof was not completely exhausted, it was governed by the United States Constitution and laws.

IV. The conclusion of reversal by the Circuit Court of Appeals of the judgments of the District Court decreeing satisfaction of judgment, and non-recovery against the Surety petitioner, was correct even if New York law was applicable, since it is settled New York law that a judgment is to be treated as other debts, which, if contingently payable, are not attachable in New York.

(a) The Federal judgment, superseded and appealed, was contingent upon the action of the Federal

appellate court. Shipman Coal Co. vs. Del. & Hudson Co., 219 N.Y.S. 628, 245 N.Y. 567, is not contra, but supports the New York rule.

Point I

The rule is settled that a Federal Court judgment, superseded and pending appeal is not subject to attachment in a foreign jurisdiction.

The respondent was not at any time personally subject to the jurisdiction of the New York State Court, being absent from and non-resident of New York (R. 20, 25). The jurisdiction of the New York Court to enter judgment against respondent and to enforce execution against Huron, garnishee, depends solely upon whether an effective seizure by garnishment proceedings of property of respondent, subject thereto, in New York was had on July 12, 1938.

Pennoyer vs. Neff, 5 Otto. 714, 27 L.ed. 565, 570.

The property attempted to be seized in New York was a judgment in a tort (claim and delivery) action in favor of respondent and against petitioner Huron, rendered by the United States District Court for the District of Idaho, which judgment on July 12, 1938, at the time of attempted seizure by the New York State Court was superseded and pending and undecided, on appeal taken by petitioner Huron to the United States Circuit Court of Appeals, Ninth Circuit. The appeal was not decided until February 7, 1939, after which under Rules 25 and 28 of that Court it was subject to rehearing until mandate issued and was filed in the District Court for Idaho on March 13, 1939. Prior thereto

the New York Court purported, on February 27, 1939, to enter judgment against respondent, and on March 1, 1939, petitioner Huron, as garnishee under the attempted seizure and an execution, paid to the New York Sheriff moneys which it has contended resulted in partial satisfaction of the United States judgment.

The Federal rule is well settled, without conflict or dissent, and indeed conceded by petitioner (Petition, pp. 6, 8) that such United States judgment was not then subject to seizure by the New York court.

Wabash Ry. Co. vs. Tourville, 179 U.S. 322, 327; 45 L.ed. 210, 214.

Wallace vs. McConnell, 13 Pet. 136.

Menees vs. Mathews, 137 Fed. 633.

Franklin vs. Ward, 9 Fed. Cas. 711.

Thomas vs. Wooldridge, 23 Fed. Cas. 986.

Henry vs. Mining, 15 Fed. 649.

Mack vs. Winslow, 59 Fed. 316.

Lowenstein vs. Levy, 212 Fed. 383.

Ackerman vs. Tobin, 22 Fed. (2) 541.

U. S. Shipping Board vs. Hirsch Lumber Co., 35 Fed. (2) 1010.

Point II

A motion requires no answer; whether a United States Court judgment is attachable is a question of law. The Circuit Court of Appeals did not volunteer grounds for its decision.

Petitioner asserts (p. 19) that its motion for satisfaction

of judgment was not answered and therefore admitted, without objection, an effective seizure and payment. Respondent was not required to answer a motion; whether seizure and payment was effective under the circumstances and by the procedure asserted in the motion was a question of law which was presented by respondent, not limited to the ground asserted by petitioner (pp. 19-20) based upon a partial quotation from respondent's brief (not in the record) in the Circuit Court of Appeals. That brief presented, and there were argued in both the District Court and the Circuit Court of Appeals, three main propositions, set forth therein (p. 22), as follows:

> "1. Assuming the applicability of New York law, the New York rule may be said to be that a judgment, pending appeal and not presently enforceable by reason of supersedeas bond, is not subject to garnishment in New York since it is not, at that time, a debt presently enforceable and payable, and whether it ever will be is contingent upon the action to be taken by the appellate court, and it is not, at that time, a cause of action, since it cannot be the subject of action to enforce it.
>
> "2. A judgment recovered in a United States court and pending on appeal, with supersedeas, to a United States Circuit Court of Appeals, is not subject to state local law, but to the Constitution and laws of the United States, and to the control and jurisdiction of the Federal Courts, and is not subject to attachment, nor the appealing judgment debtor to garnishment, by a state court; the decisions of the United States Supreme Court so hold; to permit garnishment by a state court would be unwarranted and improper interference with, and make ineffective, the jurisdiction of an appellate court of the United States.
>
> "3. A cause of action in tort (claim and delivery)

> is not ,prior to action commenced, or while action therefor, is pending, subject to attachment; an action filed in the United States District Court for the District of Idaho is pending until final determination upon appeal."

The Circuit Court of Appeals did not, therefore, volunteer grounds for reversal as asserted by petitioner (p. 20).

Point III

The decision in Erie Railway Co. vs. Tompkins, 304 U.S. 64, did not subject Federal procedure nor Federal judgments on appeal to local law. Such appealed judgments, procedure and courts are governed by the Constitution and laws of the United States, not subject to interference by state courts or laws.

Petitioner asserts without argument that the decision of this Court in *Erie Railway Co. vs. Tompkins,* 304 U.S. 64, requires reversal of the rule against garnishment of Federal judgments, and application of New York law. Petitioner ignores the exception stated in the decision:

> "Third. *Except in matters governed by the Federal Constitution or by Acts of Congress* the law to be applied in any case is the law of the State."

The "matter" herein was the decision of a cause of action in tort, of which, pursuant to the Constitution and laws of the United States, the United States Courts had acquired, and were in process of exercising, jurisdiction. So long as that cause was pending in such courts, and said courts had not finally ended with it, so long as something more remained concerning or respecting such cause, or right or property, which, under such Constitution and laws, was within the

power of such courts to do, such courts had the power and duty to protect and preserve such power, property and rights, without interference from the states or state courts, or by local laws. Otherwise, the judicial power of the United States and its courts could be (as was here attempted) defeated and rendered ineffective.

The petitioner Huron originally removed the cause from the Idaho State Court to the United States District Court pursuant to the Constitution and laws of the United States; defended the cause by virtue and in accordance therewith; appealed and superseded judgment pursuant thereto; appealed to such courts for satisfaction of judgment after affirmance on appeal under such laws.

At the time of garnishment whether petitioner Huron owed anything, whether respondent had anything in New York, whether the New York court had acquired jurisdiction by the seizure of anything, was contingent and uncertain, dependent upon what action, affirmance or reversal, was taken in the future by the Circuit Court of Appeals pursuant to its powers under the Constitution and laws of the United States. If it reversed, petitioner Huron was not indebted to respondent, respondent had no seizable property in New York, the New York court had seized nothing and was deprived of jurisdiction to enter the judgment already entered, and its execution rendered nugatory.

On the other hand, if the judgment was validly and effectively seized, petitioner Huron, by a foreign sovereignty, was deprived of the effective right of appeal granted by Fed-

eral law; by such sovereignty required to pay that which the Federal appellate court might have held it did not owe; deprived of the right of retrial after reversal granted by Federal law.

Such interpretation of the Erie-Tompkins decision destroys the independence of the judicial department of the United States and places such department under the supervision and control of local law and courts; interferes with and invades the authority of the United States and its courts.

An examination of cases decided since the opinion in the Erie-Tompkins case discloses no tendency to extend the doctrine thereof to the situation here. On the contrary, this Court very carefully pointed out in *Neirbo Co. vs. Bethlehem Corp.*, 308 U.S. 165:

> "* * * we are not subjecting federal procedure to the requirements of New York law."

The United States law provides for the supersedeas bond given by petitioners and required, as did the bond, that the appeal be prosecuted to effect and petitioners answer all damages, interest and costs otherwise (Title 28, Sec. 869 U.S.C.). The only way by which an appeal can be prosecuted to effect is by securing reversal by the United States Court of Appeals, otherwise the condition of the bond is broken and the Surety is absolutely liable to respondent.

> Montgomery vs. Am. Employers Ins. Co., 22 Fed. Supp. 476; 101 Fed. (2d) 1005; cert. den. 307 U.S. 629.

The debt of the Surety petitioner to respondent under the

bond become absolute upon the mandate of the appellate court, and such debt was never attempted to be impounded in New York.

If the appeal could be rendered nugatory and without effect by the vis major of the New York court in seizing the judgment before the United States appellate court could act, it would either subject petitioners to damages under the United States statute and the bond or effectively prevent the Federal Court from assessing damage or entering judgment against the surety. The purpose of the bond was that respondent "should sustain no loss in consequence of any ineffectual effort to reverse the decree by reason of his hand being stayed pending such effort."

Louisville N. A. & C. Ry. Co. vs. Pope., 74 Fed. 1.

Respondent's hands have been stayed by Federal law since the appeal, and until this moment; it was entitled to judgment against the surety upon the bond. It cannot be made to suffer damage by the unwarranted action of the New York court; its claim against the Surety was not, in any event seized by the New York court, and the District Court was clearly in error in failing to enter judgment against the Surety petitioner.

Point IV

Even if the local New York law be applied, it is settled New York law that a Federal judgment, superseded and appealed, is only contingently payable and not subject to attachment in New York.

But even though this Court should hold, or had the Circuit Court of Appeals held, that New York law was applicable, the conclusion that the District Court's judgments be reversed would have followed, because under New York law the appealed Federal judgment was not subject to garnishment therein.

The case of *Shipman Coal Co. vs. Del. & Hudson Co.*, 219 N.Y.S. 628 is the sole reliance of petitioner. It is opposed by *Heyl vs. Taylor*, 117 N.Y.S. 916. It was affirmed without opinion by the New York Court of Appeals, 245 N.Y. 567, 157 N.E. 859, upon a question certified thereto which did not disclose that a judgment of a United States Court was involved.

The lower New York Court was primarily concerned with the situs of a judgment, which is not in issue here. It did, however, determine also that under New York law a judgment was not attachable as such, but as a "debt" or "cause of action arising upon contract" and

> "Since the judgment, even though recovered in another court, represents a cause of action, debt or demand, and it is not an 'instrument for the payment of money' within section 916, Civil Practice Act, *it ought to be treated in all respects like any other debt* * * "

The New York court was dealing with a judgment with which the courts having jurisdiction had nothing further to do, which was in all respects finally determined, then due and enforceable, not stayed by supersedeas, not contingent upon the result of appeal, reversal, or retrial. It was then an enforceable, absolutely payable debt. And because it was

in such condition the decision held that it was capable of control and enforcement by the New York courts by reason of the domicile and property there of the judgment debtor.

Not so in this case; the jurisdiction of the Federal Courts had not ended; the cause was not finally determined in those courts; the judgment was not, when attempted to be seized, or when petitioner, without raising the que ion, made payment as garnishee, due or enforceable in New York or elsewhere, was stayed by supersedeas, was contingent upon the result of appeal, was not absolutely payable then or in the future. Petitioner, by appeal and supersedeas, had denied the judgment's validity or binding character, or that it owed or was indebted to respondent in any amount. Whether it ever would owe anything to respondent, or how much, was contingent upon the future, unpredictable, decision of the Circuit Court of Appeals; if reversed it owed nothing, the cause was subject to dismissal or a new trial, the results of which were also contingent and unpredictable. In the Shipman decision, it is said that when a judgment is entered:

> "a legal obligation * * * arises on the part of the defendant to pay it."

No such obligation here existed, since it was contingent upon the action of the appellate court.

Furthermore, the law of New York cited by petitioner reads that only a contract cause of action or debt which, absolutely and not contingently, "belongs to the defendant" (Sec. 916, Petition, p. 13), and is "owing to the defendant" (Sec. 918, Petition, p. 14), is attachable. The judgment here but contingently belonged or was owed to respondent.

The Shipman decision states that a judgment "ought to be treated *in all respects* like any other debt." So treated the New York law is settled, without known dissent, that no right exists in New York for the attachment of debts (and therefore judgments) which are not, at the time of attachment, due and absolutely payable, or whose payment is dependable upon any contingency.

> "It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or in the future, and not dependable upon any contingency."
>
> Herman & Grace vs. City of N. Y., 114 N.Y.S. 1107; affirmed 199 N.Y. 600, 93 N.E. 376.
>
> Reifman vs. Warfield Co., 8 N.Y.S. (2) 591.
> Sheehy vs. Madison Square Garden Assn., 266 N.Y. 44, 193 N.E. 633.
>
> "* * If a liability is contingent, no attaching rights exist. * *
>
> "There can, then, be no attachment of, or levy upon, a contingent right, which may or may not become a cause of action according to the occurrence or non-occurence of a future event. The attachment failing, the order of publication falls with it."
>
> Frederick vs. Chicago Bearing Metal Co., 223 N.Y.S. 824, 224 N.Y.S. 629.

CONCLUSION

The writ should not be allowed because:

(1) It is settled law that a Federal judgment, superseded and pending appeal, is not subject to attachment by a New York Court.

(2) No interpretation of *Erie Ry. Co. vs. Tompkins* requires reversal of such settled law, nor the subjection of Federal judgments, courts or procedure to the interference of state courts.

(3) In any event, the conclusion and judgment of the Circuit Court of Appeals was correct, since the appealed Federal judgment was not, by the settled law of New York, subject to seizure by New York courts.

(4) There exists no special or important reason, no conflict of decisions, nor unsettled important question of Federal law, requiring consideration by this Court.

The petition should be denied.

Respectfully submitted,

D. WORTH CLARK,
Washington, D. C.,
SAM S. GRIFFIN,
W. H. LANGROISE,
E. H. CASTERLIN,
Boise, Idaho,
Counsel for Respondent.